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By ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
TW-B204
Washington, DC 20554

Re: *WC Docket No. 03-11: Application of Qwest Communications International, Inc. to Provide In-Region, InterLATA Services in the States of New Mexico, Oregon and South Dakota*

Dear Ms. Dortch:

Pursuant to the Commission's January 15, 2003 Public Notice in the above-referenced proceeding, DA 03-125, Touch America, Inc. ("Touch America") hereby opposes the Consolidated Application of Qwest Communications International Inc. ("Qwest") for authority to provide in-region, interLATA services in the States of New Mexico, Oregon and South Dakota.[1] Because the Application is, in large part, a rehash of Qwest's prior 271 Application,[2] the Commission should not be lulled into furthering Qwest's entry into the in-region, interLATA market. Qwest not only fails to meet the requirements of Section 271 but, at the same time,

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1 *See In the Matter of Qwest Communications International Inc. Consolidated Application for Authority to Provide In-Region, InterLATA Services in New Mexico, Oregon and South Dakota*, WC Docket No. 03-11 (filed Jan. 15, 2003)("Application").

2 *See Consolidated Application for Authority To Provide In-Region, InterLATA Services in Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, WC Docket No. 02-314 ("Prior Application").

Qwest continues to prematurely provide in-region, interLATA services. Qwest has also further muddied the waters surrounding its 272 affiliate. Qwest now admits that it intends to use Qwest Communications Corporation ("QCC") as its 272 affiliate – once all of its accounting irregularities are cleaned up – and contends that QCC, or the other 272 affiliate still in the running, Qwest Long Distance Corp. ("QLDC"), will comply with Section 272.

Any representation by Qwest as to QCC's compliance with Section 272 is clearly premature and sets the stage for Qwest to once again flaunt the Commission's "complete-as-filed" rule. Moreover, as Qwest relies on much of the same record from its Prior Application, this Application should fail for the many reasons set forth in the prior docket. The Commission must look hard at this Application, not just rubber-stamp it as a replication of the Prior Application or dismiss genuine concerns or deficiencies in favor of future enforcement. Such a hard look will reveal that Qwest's Application should be denied.

A. The Commission should not be forced to evaluate the Application with a 272 affiliate that is a moving target.

Armed with 271 approval for 9 states, Qwest now comes clean with its true intentions regarding QCC. Qwest makes clear that once QCC's financial restatement process is complete – which is likely to take place while this Application is pending – QCC will become the 272 affiliate. Indeed, Qwest includes both QLDC and QCC in its 272 representations.[3] However, until QCC's restatement is complete and fully analyzed and understood, no assertions as to QCC's compliance with Section 272 is credible and Qwest's 272 representations with respect to QCC are questionable, at best.

QCC has been plagued with accounting irregularities, which Qwest continues to sort out many months after such irregularities were revealed. As such, QCC's past conduct casts a cloud over any predictive judgment as to QCC's future compliance with section 272. The Commission must be able to fully vet QCC – including the financial restatements – before it can make a predictive judgment as to 272 compliance. Indeed, the fact that the New Mexico Public Regulation Commission and the South Dakota Public Utilities Commission never ruled on Qwest's compliance with Section 272, deferring the question to this Commission, further underscores the need for the Commission to closely scrutinize Qwest's 272 compliance.

Qwest must be clear as to which entity will serve as the 272 affiliate and provide sufficient evidence – at the time its Application is filed – that such entity will comply with its section 272 obligations. Qwest has failed to do so, particularly with respect to QCC. QCC's financial restatements are not yet complete and therefore cannot be used to support Qwest's claim of Section 272 compliance. Consequently, the Commission is unable to determine whether Qwest is in compliance with the requirements of Section 272 and, as a result, whether Qwest is engaged in unlawful discrimination and cross-subsidization, both of which are at the center of the competitive market envisioned and required by Section 271.

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[3] *See* Application at 156-63.

Qwest states that, if QCC's restatement process is completed while the Application is pending, "Qwest will file additional information regarding compliance with Section 272(b)(2) by QCC."[4] Qwest's position clearly demonstrates Qwest's lack of respect for the complete-as-filed rule. Although the Commission has waived the complete-as-filed requirement "if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest,"[5] such special circumstances are not present in this instance and waiver of the rule would not serve the public interest, nor has Qwest made any showing to that effect. In the 271 context, the Commission has primarily waived the "complete-as-filed" rule when a Bell Operating Company ("BOC") has proposed UNE rate reductions in response to concerns that the rates are excessively high.[6] While it may be easier to see how waiver of the "complete-as-filed" rule in that context may benefit the public interest, here, waiver of the rule benefits only Qwest. Further, in this instance, Qwest would not be responding to arguments in the record, but would merely be providing "additional arguments or information," which is insufficient to warrant a waiver of the "complete-as-filed" rule.[7] In sum, the Commission is not able to make a predictive judgment at this time as to QCC's future compliance with Section 272 and any subsequent attempt by Qwest to supplement the record with information related to QCC's restatement will violate the Commission's "complete-as-filed" rule. Qwest's Application must therefore be denied until such time as Qwest can provide timely and sufficient evidence of QCC's future compliance with Section 272.

The Commission cannot take refuge in its grant of the Prior Application. Touch America, along with other commenting parties, argued in that proceeding that QLDC was "nothing more than a placeholder long distance affiliate for Qwest until its restatement is complete and its books and records are put in order."[8] Touch America stated that the Commission should not be fooled by this chicanery and that the "Commission must make its Section 272 compliance determination on a real long distance affiliate, not a temporary, propped-up corporate shell."[9] The Commission, however, concluded "that Qwest has adequately demonstrated that QLDC will be the entity providing in-region, interLATA service . . . ."[10] stating that it was "not persuaded that Qwest intends for QCC . . ., not QLDC, to actually conduct operations as the section 272 affiliate."[11] Nevertheless, the Commission also stated that it would "monitor this situation closely" and investigate "Qwest's compliance" with its rules

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4 *See* Application at 155.

5 *Application by Qwest Communications International Inc. for Authority To Provide In-Region, InterLATA Services in Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, Memorandum Opinion and Order, FCC 02-332, ¶ 177 (rel. Dec. 23, 2002) ("*271 Order")*.

6 *See id*. at ¶178. *See also Application of Verizon New England Inc. for Authorization to Provide In-Region, InterLATA Services in Rhode Island*, CC Docket No. 01-324, 17 FCC Rcd. 3300, 3307, ¶ 9 (2002).

7 *Id*. at 3308-09, ¶ 12. *See also 271 Order* at ¶ 486.

8 WC Docket No. 02-314, Touch America Opposition at 6.

9 *Id.*

10 *271 Order* at ¶ 398.

11 *Id.* at ¶ 399.

"should the circumstances warrant."[12]

Now, Qwest is flat out stating that it will provide in-region, interLATA services through QCC once the financial restatement process is complete.[13] Thus, as of the date the Application was filed, the Commission cannot take refuge in its holdings granting the Prior Application that the accounting irregularities of QCC don't "have a bearing on the relationship between the BOC and its designated section 272 affiliate"[14] or that QLDC "has shown that it has implemented adequate policies and controls that ensure GAAP compliance today and on a going-forward basis."[15] Since QCC, along with QLDC, is a Section 272 affiliate for purposes of the instant Application, its accounting irregularities do have a bearing on its relationship with the BOC and there is no showing of adequate accounting controls. Qwest fails to meet the requirements of Section 272 and its Application should therefore be rejected.

B. Qwest's continued violations of Section 271 mandate denial of the Application.

Qwest continues to violate Section 271 by providing in-region, interLATA services through the sale of "lit capacity" IRUs and other artifices designed to disguise its unlawful behavior. In connection with Qwest's prior 271 applications, Touch America demonstrated Qwest's unlawful behavior, and the Commission must fully investigate and resolve this issue before allowing Qwest to enter the in-region, interLATA market. Qwest's unlawful actions are not part of some distant and irrelevant statutory violation, but are violations of the very statute under which Qwest seeks relief. Consequently, regardless of whether the issue is before the Commission in another proceeding,[16] the Commission should fully address it here before granting Qwest permission to enter the in-region, interLATA market.

The Commission most recently confirmed in the *271 Order* that BOCs are prohibited from providing interLATA service in any in-region state prior to receiving Section 271 approval from the Commission.[17] Yet, the Commission adopted a narrow perspective of such violations, essentially ignoring them for purposes of Qwest's Prior Application because such violations do not "relate to the openness of the local telecommunications markets to competition."[18] Touch America respectfully disagrees with the Commission's findings. Because the bundling of services has become paramount in a carrier's ability to market services, inasmuch as Qwest has captured long distance customers – albeit unlawfully – it is better positioned to also capture such customers' local service.

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12 *Id.*

13 The Commission is apparently expected to accept the restatement at face value. *See* Application at 155 ("the Commission should conclude that, upon completion of the restatement process, QCC will be a compliant Section 272 affiliate").

14 *271 Order* at ¶ 405.

15 *Id.* at ¶ 406.

16 *Id.* at ¶ 418.

17 *Id.* at ¶ 503.

18 *Id*.

Moreover, and irrespective of the manner in which Qwest's violations affect the local telecommunications markets, its violations clearly go to whether the approval of Qwest's Application is in the public interest. Qwest's violations of Section 271 are contrary to the public interest and, therefore, in violation of Section 271(d)(3)(C) which mandates that the Application "is consistent with the public interest, convenience, and necessity." It is inconsequential that these violations may be irrelevant to opening local markets. Neither the language of Section 271(d)(3)(C) nor its legislative history contains such a limitation. To the contrary, other sections of the Communications Act which use the same phrase, such as Section 310(d), have been interpreted by the Commission as requiring an applicant to possess "the requisite 'citizenship, character, financial, technical, and other qualifications."[19] As defined by the Commission, these qualifications include "non-FCC related misconduct," such as fraudulent misrepresentations, as well as "FCC-related conduct" whereby the Commission treats "any violation of any provision of the Act, or of the Commission's rules or policies, as predictive of an applicant's future truthfulness and reliability, and thus, as having a bearing on an applicant's character qualifications."[20]

The Commission is not at liberty to interpret the Act by defining a phrase in one section differently than it defines it in a different section. In other words, the courts have ruled that "identical words used in different parts of the same act are intended to have the same meaning."[21] Even if the Commission was at liberty to apply two different standards to the same statutory language, to do so in this instance only gives a wink and a nod to other BOCs to provide in-region, interLATA services before obtaining permission to do so, thereby nullifying the Commission's admonitions to the contrary.[22]

C. Because Qwest relies, in large part, on the same processes, procedures and data that supported its previous Joint Application, the infirmities of its Prior Application apply with equal force in this proceeding.

In support of its Application, Qwest states that "both the manner in which Qwest provides the checklist items and the Operational Support Systems used deliver them in New Mexico, Oregon and South Dakota are substantially similar, if not identical, to those in the [prior Application] states."[23] As such, the billing, database access and other OSS problems that competitive carriers raised in connection with Qwest's Prior Application apply with equal force in this proceeding, thereby requiring the Commission to deny the Application.

For instance, competitors raised serious concerns related to access to loop qualification information, the volume and quality of manually processed orders, significant billing inaccuracies and processes (*e.g.*, the availability of electronic auditing capability), and

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19 *Applications of Ameritech Corp. and SBC Communications, Inc. For Transfer of Control of Corporations Holding Commission Licenses and Lines*, 14 FCC Rcd. 14712, 14948 (1999)(citation omitted.)

20 *Id.* (emphasis added.) *See also,* 47 U.S.C. §214(a).

21 *See Gustafson v. Alloyd Co., Inc.*, 115 S.Ct. 1061, 1067 (1995).

22 *271 Order* at ¶ 503.

23 Application at 2-3.

preorder/order integration problems. The Commission rejected each of these concerns, finding the competitor's evidence "unpersuasive" or the problem insignificant. Indeed, the Commission sought out ways to discredit the competitors' concerns, thereby paving the way for approval of the Application.[24] For example, in addressing the evidence that Qwest hid certain MLT capabilities from the Commission's staff, the Commission found that the allegations "while of potential concern, do not implicate issues that are significant in the record, nor do they have a bearing on [its] finding of Qwest's compliance with [the] checklist."[25] Those carriers whose businesses rely on the non-discriminatory availability of loop information would certainly find Qwest's conduct of significance and, accordingly, so should the Commission.[26]

D. Qwest has failed to demonstrate that its systems and processes will be capable of satisfying significant CLEC demand for UNEs.

Qwest's Application is woefully deplete of the commercial activity in the States of New Mexico, Oregon and South Dakota sufficient to demonstrate that its systems and processes are capable of satisfying significant levels of competition in these states. For instance, Qwest has only provisioned:

- 5,197 UNE-P combinations for 4 CLECs in New Mexico[27]
- 5,935 and 6,163 unbundled loops in South Dakota and New Mexico, respectively[28]
- 23 and 453 EELs in South Dakota and Oregon, respectively[29]
- 1,365 and 1,468 unbundled shared loops in New Mexico and Oregon, respectively, and no shared loops in South Dakota[30]
- 3 DS1 transport facilities in South Dakota[31]

The Commission must ensure that Qwest's systems are adequate to meet CLEC demand in each state, rather than look to the commercial activity of one state – with higher levels of commercial activity – and conclude that Qwest therefore meets its obligations in other states. Qwest has clearly failed to demonstrate this its systems are scalable in the States of New Mexico, Oregon and South Dakota and, as such, its Application should be denied.

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[24] *See, e.g,. 271 Order at* ¶ 50 ("[w]e are not persuaded by the allegations made by AT&T and WorldCom that the evidence does not support a showing of carriers' ability to integrate pre-ordering/ordering functions").

[25] *See id*. at ¶ 83.

[26] *See id.* at ¶ 92 ("[w]e find that Qwest's performance on unbundled jeopardy notices is not competitively significant").

[27] Application at 44.

[28] *Id*. at 60.

[29] *Id*. at 53.

[30] *Id*. at 74.

[31] *Id*. at 78.

E. The "secret" agreements have tainted and undermined the record in this proceeding.

Qwest entered into "secret" agreements with CLECs for the States of New Mexico, Oregon and South Dakota. The Commission should not again play down the effects of these agreements on the record in this proceeding. As with its Prior Application, Qwest claims that it has resolved any issues associated with these secret agreements by filing them for approval with the respective state public utility commissions and making the terms available to CLECs on a going-forward basis.[32] Qwest's actions, however, do nothing to cure the fact that the secret agreements prevented certain parties from participating in the 271 proceeding, thereby denying this Commission the benefit of such parties' experience with Qwest in these states, and skewed the performance data relied upon by Qwest in this proceeding. In its *271 Order*, the Commission found that that "no commenter offered persuasive evidence that the KPMG OSS test data were compromised as a result of unfiled agreements."[33] It defies logic to think that Qwest providing preferential terms and conditions to certain of its competitors did not affect the OSS performance results relied upon by Qwest to supports its applications. Indeed, as the applicant, the burden is on Qwest to demonstrate compliance with Section 271, not on the competitive industry to demonstrate lack of compliance. For these reasons, the Commission must seriously consider and investigate this issue before permitting Qwest into the in-region, interLATA market and not merely "anticipate that any violations of the statute or [its] rules will be addressed expeditiously through federal and state complaint and investigation proceedings."[34]

F. Future enforcement is not adequate to address the deficiencies in the Application.

In its *271 Order*, the Commission glossed over many issues – some of which are raised again in this letter – and, rather than addressing the issues head-on in the 271 proceeding, deferred the matters to future enforcement. The Commission adopted this approach with respect to matters like 271 violations,[35] future 272 violations and accounting irregularities,[36] and jeopardy and service order completion notices.[37] These are matters that go to the heart of Section 271 and, as such, the Commission must resolve them within the confines of the 271 process, rather than defer them to future enforcement proceedings. Stated differently, the Commission must not leave the future of local competition in these states to future enforcement but, instead, it must hold Qwest to a standard of meeting the requirements of Section 271 prior to granting it 271 authority.

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32 Application at 174-76.
33 *271 Order* at ¶ 486.
34 *Id.* at ¶ 466.
35 *Id*. at ¶ 503.
36 *Id*. at ¶ 386.
37 *Id.* at ¶¶ 92 & 97.

For the foregoing reasons, Touch America respectfully requests that the Commission deny Qwest's Application to provide in-region, interLATA services in the States of New Mexico, Oregon and South Dakota.

Respectfully submitted,

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/s/

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cc: Attached Service List